

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF OKLAHOMA
3
4 STATE OF OKLAHOMA, ex rel,)
5 W.A. DREW EDMONDSON, in his)
6 capacity as ATTORNEY GENERAL)
7 OF THE STATE OF OKLAHOMA,)
8 et al.)
9 Plaintiffs,)
10 V.)
11 TYSON FOODS, INC., et al.,)
12 Defendants.)
13 No. 05-CV-329-GKF-SAJ

13 REPORTER'S TRANSCRIPT OF PROCEEDINGS
14 FEBRUARY 22, 2008
15 PRELIMINARY INJUNCTION HEARING
16 VOLUME IV

17
18 BEFORE THE HONORABLE GREGORY K. FRIZZELL, Judge
19

20 APPEARANCES:

21 For the Plaintiffs: Mr. Drew Edmondson
22 Attorney General
23 Mr. Robert Nance
24 Mr. Daniel Lennington
25 Ms. Kelly Hunter Burch
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UNITED STATES COURT REPORTER

1 of a grower's file, but there was also testimony that Peterson
2 didn't endorse it. And it was just a resource for the growers,
3 but Peterson isn't adopting this language as its own.

4 MR. BULLOCK: Judge, just very quickly, I call the
5 Court's attention in that regard to the second page which is
6 the letter from the president of Peterson Farms at that time.

7 THE COURT: I saw that.

8 MR. BULLOCK: And he writes that it is important to
9 provide you with the most up to date information on water
10 quality information which will serve as a tool in managing your
11 poultry operations.

12 THE COURT: I saw that.

13 MR. BULLOCK: I will now call Dr. Robert Taylor.

14 CHARLES ROBERT TAYLOR

15 Called as a witness on behalf of the plaintiffs, being first
16 duly sworn, testified as follows:

17 THE COURT: State your full name for the Court,
18 please.

19 THE WITNESS: My full name is Charles Robert Taylor.

20 THE COURT: Thank you, sir. Mr. Bullock, you may
21 inquire.

22 DIRECT EXAMINATION

23 BY MR. BULLOCK:

24 Q. Where do you live, Dr. Taylor?

25 A. I live in Opelika, Alabama.

1 understands the context of Dr. Taylor's testimony, it goes to
2 the arguments advanced from page 14 to 17 of the Plaintiffs'
3 brief in support of the motion for preliminary injunction.

4 Q. (By Mr. Bullock) Within the poultry industry, what is the
5 extent of vertical integration?

6 A. It's almost completely vertically integrated and has been
7 for decades. USDA statistics show something like 95 percent of
8 the poultry industry is vertically integrated. The remaining 5
9 percent is largely some organic operations, pastured poultry
10 and natural poultry in some niche marketing.

11 Q. What do you mean by niche marketing?

12 A. Small special markets for a special commodity such as an
13 organically-grown chicken or what they call pastured poultry.

14 Q. Would you look at 430 which is in front of you or -- I'm
15 sorry, 443. What is that, Doctor?

16 A. It is a chart showing the vertical integration in the
17 broiler industry.

18 Q. Okay. And if you need to, if it would help, I think the
19 Court will allow you to step down, but if you could explain
20 what that is suggesting.

21 THE COURT: You may step down, if you'd like, sir.

22 A. This shows the organization of the commercial poultry
23 industry. We really start with a genotype in baby chicks and
24 go through production and grow-out houses, largely so-called
25 contract growers, some grow-out operations owned by the

1 integrators, then to processing where the chicken is processed.
2 Some whole processed birds are sold, but then also some are cut
3 up into pieces and sold different ways. Then a marketing
4 division and then onto the final consumer. There's actually
5 some other levels in between the market division and the final
6 consumer that aren't shown, but it shows the vertical
7 integration of production and processing.

8 Business office means the poultry company or the
9 poultry integrator. They decide on the genotype of bird that
10 will be grown, sometimes called breeds, sometimes called
11 strain, provide baby chicks to the grow-out houses. They
12 decide on the type of chick, the number of chicks, when the
13 chicks are delivered. Over on the other side, it illustrates
14 the feed mill. The integrator decides on the type of feed and
15 when that will be delivered to the grow-out houses, when the
16 feed ration will be changed and --

17 Q. (By Mr. Bullock) Now, just before you drop down, you also
18 have, between the hatchery supply farm and the grow-out, flock
19 service. What is that about?

20 A. These are representatives that work for the individual
21 integrators. Generally they visit each house once a week and
22 then report back to the integrator and make recommendations or
23 mandates to the growers on what needs to be done for that
24 flock.

25 Q. Okay. And from there it goes to the processing plant;

1 correct?

2 A. Correct.

3 Q. Now, who decides when those birds go to the processing
4 plant?

5 A. The integrator.

6 Q. Okay. And within this scheme, who -- while the bird is at
7 the grow-out, who owns the bird?

8 A. The integrator owns the bird. The integrator owns the
9 feed.

10 Q. Okay. Are there other things that we ought to learn from
11 that relative to the issue of the control over the operations
12 of the grow-out farm?

13 A. Well, the integrator controls the chicks, when they are
14 delivered, the type of feed. They control the number of chicks
15 delivered to each house. They control when the birds are
16 picked up for processing. They control when the next batch of
17 chicks is delivered. And these are usually grown under
18 contracts, so-called contracts.

19 Q. Okay. Now, what -- I think you can probably sit down
20 again. Now, within -- when we're talking about the issue of
21 the -- at the grow-out farm, what is the nature of the control
22 over the person who is supervising or even owns that farm?

23 A. The integrator controls almost all aspects. They also
24 control specification of the houses and the equipment in the
25 houses. The grower must follow recommendations and sometimes

1 mandates made by the integrator and follow the flock
2 servicemen. Generally the decision or the type of work that a
3 grower has to do is to go to the house daily, make sure feed
4 and water are being distributed properly, check for dead birds
5 and things, and pick up dead birds.

6 Q. Do you know from your study whether the poultry industry
7 in northwest Arkansas and northeast Oklahoma is vertically
8 integrated?

9 A. Yes, it is.

10 Q. Now, this particular drawing came from Avian Advice; is
11 that correct?

12 A. That is correct.

13 Q. That's the reason why the exhibit shows Avian Advice?

14 A. Yes.

15 Q. What is Avian Advice?

16 A. Avian Advice is what I would call an outreach publication
17 by the college of agriculture. I think it's called division of
18 agriculture in the poultry science department at the University
19 of Arkansas. It's a periodical.

20 Q. Now, what role do the contracts play in terms of the
21 control that you've described over the operations on the
22 individual farms?

23 A. Well, economic payback period for a poultry house and
24 equipment in the house is on the order of 20 to 30 years. Most
25 of these contracts are very short term. The dominant contract

1 nationally is for a single flock of birds which will be in a
2 house for 40 to 60 days. A few now go for longer terms, but
3 the contract terms are dictated by the integrator.

4 Q. Okay. So under the contract, I take it that when we talk
5 about who owns the birds, those types of things are provided
6 under the contract?

7 A. Yes.

8 Q. Okay. What about feed?

9 A. Feed is also provided by the integrator.

10 Q. Okay. And is that generally specified in the contract?

11 A. Yes, and it's generally specified that the grower cannot
12 get any other feed and give it to the birds.

13 THE COURT: So a new contract is executed dominantly
14 each time a new flock is delivered?

15 THE WITNESS: No. The contract is usually for a
16 single flock, but the integrator keeps delivering new batches
17 of chicks. And this can go on typically for three or four
18 years. And then the integrator will come up with a new
19 contract that's usually for one flock of birds and that will
20 continue for a few years. So the contracts state one flock
21 only, the first flock, but then the integrator and the grower
22 keep operating under that.

23 THE COURT: Kind of a month-to-month contract kind of
24 idea?

25 THE WITNESS: Two months to two months, yeah.

1 THE COURT: All right. Well, but typically they just
2 keep operating under the contract. Now, are you saying that
3 it's only good for that first flock or are there provisions
4 that allow it to provide for subsequent flocks if no other
5 contract comes in and supersedes?

6 THE WITNESS: The only -- I'm not an attorney, but my
7 economic understanding is that the integrator is obligated to
8 provide only that first flock, but then the integrator has the
9 option of placing additional flocks.

10 THE COURT: Who typically finances the construction of
11 these houses?

12 THE WITNESS: The houses and house equipment is
13 typically financed by banks with government loan guarantees,
14 typically for 90 percent of the value.

15 Q. (By Mr. Bullock) Okay. And -- but the grower actually
16 signs that 90 percent guaranteed loan as a general matter;
17 right?

18 A. I don't know about the details of who signs it. I think
19 it protects the banker, I'm not sure it protects the grower.
20 But again, I'm not an attorney.

21 Q. In these contracts you say that now that some of them are
22 for longer term than the flock to flock that you talked about.
23 Who controls when the next flock of birds will be provided?

24 A. The integrator exclusively.

25 Q. Okay. And how important is that, that is, the term

1 between when the next -- when they pick up the last flock and
2 when they deliver the next flock, how important is that issue
3 to the grower?

4 A. As I mentioned earlier, the economic payback period on a
5 poultry house and equipment is on the order of 20 to 30 years.
6 And they have to have chicks over that full period to make a
7 decent return on labor management, capital risk, all that they
8 bring to it. And it's very important that they quickly get new
9 batches of chicks, within a couple of weeks, but the integrator
10 can decide whether it's a few days or not at all.

11 Q. Dr. Taylor, before you gave your opinions in this case,
12 did you review samples of contracts between the defendants and
13 the growers in this watershed?

14 A. Yes, I did.

15 Q. Okay. And what was the nature of that review?

16 A. I quickly looked through those and the conclusion was
17 they're similar to what I've seen in other areas of the United
18 States.

19 Q. Doctor, I've put in front of you a pleading filed in this
20 case. It's Docket Number 1535 that was filed by defendant
21 Simmons. Do you see that?

22 A. Yes.

23 Q. Let's go back to the attachment which is the third page of
24 that document.

25 A. Okay.

1 A. Simmons does not.

2 Q. What does the contract provide?

3 A. Item 20 says that the grower is obliged to dispose of
4 litter in accordance with BMPs as detailed by the nutrient
5 management plan for grower's farm, developed with appropriate
6 governmental agencies and to follow all applicable regulations
7 pertaining to litter disposal.

8 Q. In this contract, do you recall any provision relating to
9 transferring the feces which come out of Simmons' birds to the
10 grower?

11 A. This just says the grower must dispose of it.

12 Q. Okay. Now, in your study of this industry, and whether in
13 this watershed or outside, are provisions providing for the
14 transfer of the birds' feces to the ownership of the grower, is
15 that generally provided?

16 A. To go back in time, a lot of the contracts I've seen from
17 the '70's and '80's and even into the '90's did not mention the
18 word litter. It's only recently that the litter provision has
19 appeared in contracts.

20 Q. And to the extent that it's in there, is it similar to
21 what we see here?

22 A. Yes.

23 Q. Okay. Now, how does this contract compare generally with
24 the contracts that you've seen in this case?

25 A. It is similar. There's slight differences in wording from

1 Q. Okay. Now, in your affidavit, you referred to contracts
2 of adhesion. What do you understand contracts of adhesions to
3 be?

4 A. That's a legal concept and not an economic phrase. And I
5 always struggle to try to translate economic jargon into legal
6 jargon. It's my understanding that a contract of adhesion
7 occurs when there is a gross imbalance of power favoring one
8 side. The extreme being one side has the option of taking the
9 contract or leaving the contract and that's it.

10 Q. And how do these contract arrangements measure up against
11 that standard?

12 A. Growers only have the option to take a contract or leave
13 it. And when a new contract is offered, they still only have
14 the option to take it or leave it. And therefore, by my
15 definition, that's a contract of adhesion.

16 Q. Okay. And given the finance issues that you described
17 earlier, does that help inform how that discussion goes?

18 A. I'm not sure I --

19 Q. Well, that was probably more complicated than it needed to
20 be. You said earlier that the houses will be financed over a
21 number of years. The options of the grower at the time of the
22 contract renewal, are they affected by that?

23 A. Yes.

24 Q. How so?

25 A. When I refer to an economic payback period of 20 to 30

1 years, I'm using the economic concept of a reasonable or market
2 return for all that a grower brings. Loans for new house
3 construction range from seven to 15 years. And during that
4 time, growers typically don't make much for their labor and so
5 forth. They're paying off the loan. Quite often after 10 or
6 15 or 20 years, they have to make a major upgrade and quite
7 often they have to get a loan on that. But loans are generally
8 from 7 to 15 years on a house and 7 or 10 on new equipment
9 depending on the extent of the upgrade.

10 Q. Within this market today, is there a place for a grower
11 that decides that he's just going to take his houses and go out
12 and raise birds on his own without association with an
13 integrator?

14 A. Only the niche marketing possibilities I mentioned
15 earlier. But in general, they can't take a commercial broiler
16 out, raise it up to processing weight and haul it and sell it
17 at a market.

18 Q. Is there an economic term for the type of situation that
19 you've described here?

20 A. Yes.

21 Q. What is that?

22 A. Well, economists have their own jargon. Monopsony is the
23 technical economic phrase that describes it. It's a mirror
24 image of monopoly. Monopoly refers to seller's side power,
25 monopsony refers to buyer's side power.

1 Q. Dr. Taylor, does your -- maybe we ought to unwind that a
2 little. How does -- how does this apply in the poultry
3 industry?

4 A. Well, technically speaking, sometimes economists are
5 precise in terminology and use monopsony to refer to a
6 situation where there is only one buyer. Other times they use
7 it in a more generic sense to just mean the buyer has power
8 over the seller. There's another big word, oligopsony for when
9 you have a few. But basically the integrator has monopsony or
10 oligopsony power over the growers.

11 Q. How so?

12 A. Well, it's evident from the fact that no terms are
13 negotiated.

14 THE COURT: To the extent that occasionally growers
15 will switch integrators, this would more accurately be an
16 oligopsony; right?

17 THE WITNESS: Yes. To magnify on that, if I may,
18 there are some areas in the United States where there's only a
19 single integrator but this one has several, so oligopsony would
20 be a better term to use.

21 Q. (By Mr. Bullock) Does your description apply to the
22 operations of the poultry industry in the Illinois River
23 Watershed?

24 A. Yes, it does.

25 Q. What about to the defendant poultry companies in this

1 case?

2 A. Yes.

3 Q. What about differences between turkeys and chickens?

4 A. Well, there's biological differences. The turkeys, their
5 grow-out period is longer than for broilers. But for turkeys,
6 the integrator still owns the birds and the feed and makes the
7 decision about when poults will be placed. And they grow them
8 up to a certain age. It may be in part of a house or a
9 different house and then they're moved into a grow-out
10 facility. So generally the same kind of business model.

11 Q. Doctor, let's change to another area and that is the issue
12 of the decisions made by the companies. In terms of the
13 location of the poultry houses in this watershed, what is the
14 role of the integrator companies?

15 A. The integrator company decides on the location.

16 Q. How so?

17 A. Jargon in the industry, they have what they call
18 complexes. And a single integrator often has multiple
19 complexes. The complex is generally a fairly small geographic
20 area around a feed mill and/or processing plant. It's usually
21 the feed mill is the central part. And they only contract with
22 growers within a certain range of the feed mill. And it varies
23 somewhat, but 40 to 50 miles is generally as far out as an
24 integrator will grow to for a grow-out house. And it's the
25 integrator who decides where the complex will be and how large

1 it is.

2 Q. And so the companies, of course, decide where their
3 complexes are; correct?

4 A. Correct.

5 Q. And that really drives the concentration of the industry?

6 A. Yes, it does.

7 Q. And then they determine how many houses to contract with
8 in their region?

9 A. Correct. They determine who will be a grower, where in
10 the region the houses will be located and the size of the
11 complex.

12 Q. Okay. How does the northwest Arkansas and northeast
13 Oklahoma poultry industry compare to those in other areas of
14 the country?

15 A. It's highly concentrated. There are a few other areas
16 where poultry is also highly concentrated.

17 Q. What would be other comparable areas?

18 A. One where they're highly concentrated is known as the
19 Delmarva area that's in Delaware, Maryland and Virginia. The
20 Sand Mountain area of north Alabama is highly concentrated. The
21 far north part of Georgia has a concentrated area. And there's
22 one in south central Mississippi that's concentrated and a few
23 others.

24 Q. Now, let's go to the role which poultry waste or poultry
25 litter -- once the house is cleaned, does that play any further

1 role in the production of the poultry?

2 A. No, it does not.

3 Q. And do you know what the most common manner of disposal of
4 poultry waste is in this area?

5 A. Nationally and in the IRW, it's land application.

6 MR. BULLOCK: Okay. I have nothing further. I'll
7 surrender the witness.

8 THE COURT: Mr. Elrod.

9 MR. EDMONDSON: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. ELROD:

12 Q. Dr. Taylor, we are meeting for the second time; is that
13 correct, sir?

14 A. Correct.

15 MR. ELROD: Your Honor, I guess you had the impression
16 that you yourself have an endowed chair and tenure.

17 THE COURT: No one has ever called me an eminent
18 scholar, Mr. Elrod.

19 Q. (By Mr. Elrod) Dr. Taylor, this is not the first time
20 that you have testified against poultry companies, including
21 Tyson Foods; is that correct, sir?

22 A. Correct.

23 Q. And you'll agree with me that the last time you testified
24 against Tyson Foods was in a case in Alabama in federal court;
25 is that correct, sir?